IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21-2-2007

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THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

C.R.P.PD.No.1711 of 2006

Mohammed Thaiyub ... Petitioner

Versus

1.Abdul Rasheed
2.Mohammed
3.Abdul Raheem
4.Hidayathullah
5.Zakaria ... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal orders passed in I.A.No.414 of 2005 in O.S.No.217 of 2001 dated 12.4.2006 on the file of the Court of District Munsif-cum-Judicial Magistrate Court, Kattumannar Koil.

For Petitioner : Mr.A.Muthukumar

ORDER

Aggrieved over the fair and decreetal orders passed in I.A.No.414 of 2005 in O.S.No.217 of 2001 dated 12.4.2006 on the file of the Court of District Munsif-cum-Judicial Magistrate Court, Kattumannar Koil, the civil revision petition is filed.

2.Brief facts of the case are as follows:

The petitioner is the plaintiff, who filed a suit for permanent injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment of the suit property. In the said suit three advocate commissioners were appointed and they had filed their reports. The respondents/defendants have filed an application in I.A.No.414 of 2005 to scrap the reports filed by the earlier commissioners and appoint a fresh commissioner to measure the property and note down the physical features of the suit properties and to submit his report. Though the earlier reports were not scraped, the learned District Munsif-cum-Judicial Magistrate, Kattumannar Koil allowed the said application as far as the re-issue of commission is concerned.

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3.Aggrieved over the said orders, the present civil revision petition is filed.

4.Mr.A.Muthukumar, the learned counsel appearing for the revision petitioner would contend that there had already been three commissioners' reports. According to the learned counsel for the petitioner without scraping the earlier commissioners' reports,new commissioner cannot be appointed.

5.In support of his contention the learned counsel appearing for the petitioner pressed into service a judgement in the case of R.Sivasubramanian vs. S.Balamurugan reported in 2006 (2)CTC 54, wherein a Honourable brother Judge of this court held as follows:

> "4.The Trial court in the impugned order has not discussed the earlier Commissioner's Report and has not expressed its opinion before appointing the second commissioner. S.Nainar Sundaram, J. (As he then was) in the first decision referred above has considered the similar question and has held as follows:
>
> "It is well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh commission. The power in this behalf is circumscribed by the principles under Order 26 Rule 10(3) of the Civil Procedure Code, hereinafter referred to as the Code. The power has to be exercised only after the court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express an opinion that the proceedings and the report of the earlier Commissiner are not satisfactory. The court below has opined that the truth or otherwise of the allegations thrown against the Commissioner's report need not be gone into and it is better to change the Commissioner. It has proceeded on the basis that allegations are thrown against the earlier Commissioner and hence, it is not fair to accept-his report. This is not the proper method of dealing with an application of the present nature."

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5.Following the above decision, Sathiadev, J. in the second decision referred above, considered the necessity for appointment of the second Commissioner based on the objections filed by the parties to the earlier Commissioner's Report and held as follows:

"Merely because certain objections have been filed, it would not result in a second Commissioner being appointed, on that day itself. Learned counsel for the petitioner relies on the decision in Viswanathan v. Shanmugham and another, 1985 (1) MLJ 254, to show as to when exactly the report of a previous Commissioner could be scrapped. It is obligatory on the part of the Court to give convincing reasons as to why the previous report filed cannot be acted upon".

6.I am in respectful agreement with the views expressed by the learned Judges in the above decisions. In the present case, merely because objections were filed by the respondent herein to the earlier report, the Trial Court cannot appoint a second Commissioner unless it renders a finding that the earlier Commissioner's Report unsatisfactory. No such finding of dissatisfaction has been made in the impugned order and hence it is liable to be set aside."

6.The facts of the case referred to above squarely applies to the facts of the case on hand. Since there are already three commissioners' reports in existence, there is no necessity for a 4th Commissioner's report unless the earlier findings of the commissions differ.

7.Therefore in the absence of any defect in earlier commissioners' reports, to re-issue a new commission warrant to the same commissioner or a new commissioner is unwarranted. Hence the civil revision petition is allowed. No costs. Consequently the connected M.P.No.1 of 2006 is closed.

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To:

The District Munsif cum Judicial Magistrate,
Kattumannarkoil.

+ 1 cc to M/s. A. Muthukumar, Advocate SR.10158

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